Supreme Court, U. S.
FILED
APR 28 1976
MICHAEL RODAK, JR., CLERK

No. 75-1536

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DAVID KOPP

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
MICHAEL J. KEANE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

NO.

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DAVID KOPP

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 1a-2a) and its order denying rehearing (App. C, *infra,* p. 5a) are not reported. The order of the district court (App. D, *infra,* p. 7a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra,* p. 3a) was entered on November 6, 1975. The government's timely petition for rehearing and suggestion for rehearing *en banc* were denied on February 24, 1976 (App. C, *infra,* p. 5a). On March 16, 1976, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including April 24, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a criminal case, the United States may appeal from a district court order dismissing an indictment, if the order is entered after the court—sitting as the trier of fact in a bench trial—has found the defendant guilty.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * * .

18 U.S.C. 3731 provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [*sic*] suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

1. On February 9, 1973, a vehicle driven by respondent was stopped by Border Patrol agents at the permanent immigration traffic checkpoint near Truth or Consequences, New Mexico, approximately 98 air miles from the Mexican border (Tr. 5-6, 10).[1] After questioning respondent about his citizenship, Agent Goad directed him to open the trunk of his vehicle to allow the agent to check for the presence of aliens (Tr. 5-6, 17). When the trunk was opened, Agent Goad saw four green trash bags and smelled a strong odor of marihuana (Tr. 6). The bags were found to contain 235 pounds of marihuana (Tr. 7-8, 27, 37).

An indictment returned in the United States District Court for the District of New Mexico charged respondent with possessing marihuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Respondent filed a pretrial motion to suppress the marihuana on the ground that the search of his car violated the Fourth Amendment. Respondent waived his right to a jury trial (Tr. 4).

The motion to suppress was heard during the trial on the merits on March 13, 1973. At the close of the evidence, the district court denied the motion to suppress (Tr. 34) and found respondent guilty as charged (Tr. 36). The court deferred sentencing (Tr. 38).

---

[1] "Tr." refers to the transcript of respondent's bench trial on March 13, 1973.

2. On June 21, 1973, about three months after the trial in this case, this Court held, in *Almeida-Sanchez* v. *United States,* 413 U.S. 266, that a warrantless roving patrol search of a vehicle for aliens, conducted without probable cause at a point removed from the border and its functional equivalents, was unreasonable under the Fourth Amendment. The Tenth Circuit thereafter ruled, in *United States* v. *King,* 485 F.2d 353, and *United States* v. *Maddox,* 485 F.2d 361, that the principles of *Almeida-Sanchez* should be applied retroactively and that such principles encompassed searches conducted at fixed traffic checkpoints. The court of appeals remanded those cases to the district court for a determination, after an evidentiary hearing, whether the Border Patrol checkpoint near Truth or Consequences, New Mexico, is the functional equivalent of the border.

The present case (together with other cases then pending in the district court) was consolidated with *King* and *Maddox* before another judge for the evidentiary hearing on the functional equivalency issue. The district judge who presided over that hearing concluded that the Truth or Consequences checkpoint was not a functional equivalent of the border, and he referred the various consolidated cases back to their original judges for further proceedings. *United States* v. *King, et al.,* D. N. Mex., Crim. Nos. 24560, *et al.,* September 9, 1974.

The district judge in the present case thereupon entered an order dismissing the indictment (App. D, *infra,* p. 7a). The order stated that "the facts herein are identical in all material respects with those in *United States* v. *King,* * * * and the parties herein having participated in the joint hearing held in that cause, * * * the Court conclud[es] that the decision therein is the law of this case, and that similar action should be taken" (*ibid.*).

3. The United States appealed pursuant to 18 U.S.C. 3731. After this Court ruled in *Bowen* v. *United States,* 422 U.S. 916, that *Almeida-Sanchez* should not be applied retroactively to checkpoint searches conducted prior to June 21, 1973, the government in the present case moved for summary reversal of the district court's order dismissing the indictment.

The court of appeals, without reaching the merits of the appeal and without the benefit of briefs or oral argument, dismissed the government's appeal for lack of jurisdiction. The court stated that "[t]he pivotal question * * *, with respect to our jurisdiction [under 18 U.S.C. 3731], is whether any further proceedings in this case required by a potential remand would be impermissible under the double jeopardy clause of the constitution" (App. A, *infra,* p. 2a). The panel was of the view, notwithstanding the district court's previous finding that respondent was guilty as charged, that "the only consequence of a reversal by this court would be to retry the defendant" (*ibid.*).

Relying on this Court's decision in *United States* v. *Jenkins,* 420 U.S. 358, the court of appeals concluded that "the government has no right of appeal," because "the defendant has been placed once in jeopardy and further proceedings would necessarily involve a 'resolution of factual issues going to the elements of the offense charged'" (App. A, *infra,* p. 2a). "To subject appellee to further proceedings of this nature," the court stated, "would be to violate the double jeopardy clause" (*ibid.*).

The court thereafter denied the government's petition for rehearing and suggestion for rehearing *en banc* (App. C. *infra,* p. 5a). The order denying rehearing stated:

"In our view, the Supreme Court's decision in United States v. Jenkins, 420 U.S. 358, (1975) controls in this case and not United States v. Wilson, 420 U.S. 322 (1975) as suggested by the government" (*ibid.*).

REASONS FOR GRANTING THE WRIT

This case differs from *United States* v. *Morrison* and *United States* v. *Rose*, in which we have also filed petitions for writs of certiorari,[2] in only one material respect. Whereas the district courts in *Morrison* and *Rose* entered post-guilty-finding orders suppressing evidence, the district court here entered a post-guilty-finding order dismissing the indictment. That difference does not affect the government's right to appeal from a ruling of law at that stage of a criminal case. The controlling fact in all three cases is that the district court's ruling was entered *after* a finding of guilty by the court as the trier of fact. All that would remain to be done on a remand following a reversal on appeal is the imposition of sentence and the entry of a judgment of conviction.

Here, as in *Morrison* and *Rose*, the court of appeals misapprehended the principles of this Court's decisions in *United States* v. *Wilson*, 420 U.S. 332, and *United States* v. *Jenkins*, 420 U.S. 358. For the reasons stated in our petition in *Morrison*, review by this Court is warranted in order to correct the court of appeals' error and to avert the erosion of *Wilson* and *Jenkins*.

---

[2]Copies of those petitions have been sent to respondent's counsel.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
MICHAEL J. KEANE,
Attorneys.

APRIL 1976.

APPENDIX A

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,	)	
vs.	)	NO. 74-1765
JOHN DAVID KOPP, DEFENDANT-APPELLEE.	)	

Filed : November 6, 1975

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. NO. 25019CR)

Before Honorable John C. Pickett, United States Senior Circuit Judge and Honorable Oliver Seth and Honorable Robert H. McWilliams, United States Circuit Judges

---

PER CURIAM

Following a trial to the court, Appellee Kopp was found guilty of a violation of 21 U.S.C. §841(a)(1). However, a formal judgment of conviction was never

entered. Instead, the district court dismissed the indictment apparently as a consequence of the evidentiary hearing required by our mandate in United States v. King, 485 F.2d 353, (10th Cir. 1973).

Central to both cases was the validity of the respective searches by which the contraband underlying defendants' prosecution was discovered. The facts critical to the resolution of the search issue in these cases were substantially similar and the district court's determination on remand, adverse to the government, in *King* was deemed to be applicable to this case.

Following the dismissal of the indictment in this case, the government promptly sought appellate review pursuant to 18 U.S.C. §3731. Essentially §3731 provides a right of appeal by the government in criminal prosecutions whenever the constitution permits. The statute, however, expressly precludes a government appeal "where the double jeopardy clause of the United States Constitution prohibits further prosecution". The pivotal question then, with respect to our jurisdiction, is whether any further proceedings in this case required by a potential remand would be impermissible under the double jeopardy clause of the constitution.

As we view it, the only consequence of a reversal by this court would be to retry the defendant. Unquestionably, the defendant has been placed once in jeopardy and further proceedings would necessarily involve a "resolution of factual issues going to the elements of the offense charged. . .". *See,* United States v. Jenkins, U.S. , 95 S.Ct. 1006 (1975). To subject appellee to further proceedings of this nature would be to violate the double jeopardy clause. Under these circumstances, we conclude that the government has no right of appeal and we must therefore dismiss the purported appeal for lack of jurisdiction.

In view of this disposition, the merits of the government's motion to summarily reverse need not be reached.

Appeal dismissed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEPTEMBER TERM - NOVEMBER 6, 1975

Before The Honorable John C. Pickett, Senior Judge, The Honorable Oliver Seth and The Honorable Robert H. McWilliams, Circuit Judges

UNITED STATES OF AMERICA, PLAINTIFF-Appellant,	)	No. 74-1765
vs.	)	(D.C. No.
JOHN DAVID KOPP, DEFENDANT-APPELLEE.	)	25019-CR.)

Upon consideration of the record on appeal and the files of this court, it is ordered that the appeal is dismissed for lack of jurisdiction, pursuant to Rule 8 on the Court's own motion.

/s/ Howard K. Phillips

HOWARD K. PHILLIPS, Clerk

APPENDIX C

JANUARY - FEBRUARY 24, 1976

Before The Honorable David T. Lewis, Chief Judge, The Honorable John C. Pickett, Senior Circuit Judge, The Honorable Delmas C. Hill, The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams, The Honorable James E. Barrett and The Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA PLAINTIFF-APPELLANT, vs. JOHN DAVID KOPP, DEFENDANT-APPELLEE.	)	NO. 74-1765

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the circuit judges, Pickett, Seth, and McWilliams to whom the appeal was submitted. In our view, the Supreme Court's decision in United States v. Jenkins, 420 U.S. 358, (1975) controls in this case and not United States v. Wilson, 420 U.S. 322 (1975) as suggested by the government.

The petition for rehearing having been denied by the panel to whom the appeal was submitted and no member of the panel or judge in regular active service on the court having requested that the court be polled on rehearing en banc, the suggestion for rehearing en banc is denied. Rule 35, Federal Rules of Appellate Procedure.

/s/ Howard K. Phillips

HOWARD K. PHILLIPS, Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff,	)	NO. 25019
vs.	)	CRIMINAL
JOHN DAVID KOPP, DEFENDANT.	)	

ORDER

This matter coming on for consideration by the Court upon the agreement of the parties that the facts herein are identical in all material respects with those in *United States* v. *King*, No. 24560 Criminal, and the parties herein having participated in the joint hearing held in that cause, and the Court concluding that the decision therein is the law of this case, and that similar action should be taken; Now, Therefore,

IT IS BY THE COURT ORDERED that the Indictment herein is dismissed.

/s/ Howard Bratton
UNITED STATES DISTRICT JUDGE

FILED: October 4, 1974